IN THE SUPREME COURT

Appeal from the Court of Appeals
Fitzgerald, P.J., Neff, and White, J.J.

BETTY SORKOWITZ, Individually and as Trustee For the MORRIS AND SARAH FRIEDMAN IRREVOCABLE TRUST, Betty Sorkowitz, Trustee for the SARAH FRIEDMAN TRUST, Betty Sorkowitz, Personal Representative For The ESTATE OF SARAH FRIEDMAN, BETMAR CHARITABLE FOUNDATION, INC., JULIE SHIFFMAN and JANET JACOBS

Plaintiffs/Appellees,

v.

LAKRITZ, WISSBURN & ASSOCIATES, P.C., A Michigan Corporation, GERALD LAKRITZ and KENNETH WISSBURN, joint and several,

Defendants/Appellants,

Docket No. 126562

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BRIEF ON APPEAL OF PLAINTIFFS-APPELLEES

ORAL ARGUMENT REQUESTED

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I. The "no extrinsic evidence" issue

> Are the legal malpractice claims of plaintiffs, named beneficiaries in decedent's estate plan, "defective as a matter of law" as violating the "no extrinsic evidence" policy set forth in *Mieras v. DeBona*, 452 Mich 278 (1996)?

The trial court answered "Yes" and granted summary disposition in defendants' favor.

The Court of Appeals answered "No."

The plaintiffs contend that the answer is "No."

Defendants Lakritz, Wissbrun & Associates, P.C. and Gerald Lakritz, and Kenneth Wissbrun submit that the correct answer is "Yes."

II. The standing issue

> Which of the plaintiffs have standing to sue under *Mieras v. DeBona*, 452 Mich 278 (1996) and *Karam v. Kliber*, 253 Mich App 410 (2002)?

The trial court held that only named beneficiaries who have standing may sue for legal malpractice and that all plaintiffs lack standing.

The Court of Appeals decided resolution of the standing question should await "further discovery."

Plaintiffs submit that the plaintiffs have standing.

Defendants would presumably agree with the trial court.

STATEMENT OF JURISDICTION AND ORDERS BEING APPEALED

Defendants Lakritz, Wissbrun & Associates, P.C., Gerald Lakritz and Kenneth Wissbrun are appealing, by leave granted, the Michigan Court of Appeals' April 27, 2004 opinion (together with its June 8, 2004 order denying reconsideration) that reversed Oakland County Circuit Court Judge Colleen O'Brien's order granting summary disposition in defendants' favor. See Court of Appeals' Opinion (Apx 54a-60a) and Court of Appeals reconsideration order (Apx 61a). See also trial court Opinion and Order granting summary disposition (Apx 44a-47a) and the trial court order denying reconsideration (Apx 48a-49a). The Court of Appeals decision is published at 261 Mich App 642; 683 NW2d 210 (2004).

This Court has jurisdiction under MCR 7.301(A)(2), appeal by leave granted after decision by the Court of Appeals.

COUNTER-STATEMENT OF FACTS

This case is a legal malpractice suit. Plaintiffs are:

- The Morris and Sarah Friedman Irrevocable Trust (through its trustee, Betty Sorkowitz)
- The Sarah Friedman Trust (through its trustee, Betty Sorkowitz)
- The Estate of Sarah Friedman (through its personal representative, Betty Sorkowitz)
- Betty Sorkowitz, Sarah Friedman's daughter, a named beneficiary of the will and of the trust
- Betmar Charitable Foundation, a named beneficiary of the Sarah Friedman Trust
- Julie Shiffman and Janet Jacobs, granddaughters of Sarah Friedman, named as beneficiaries of the Sarah Friedman Trust.[1]

The case has its origins in 1988 when defendants provided estate planning services for the late Morris and Sarah Friedman. As part of those services, an estate plan was drawn up which included the following documents:

A. Last Will and Testament of Sarah Friedman, dated November 10, 1999 ("Will").

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[1] Plaintiffs' First Amended Complaint, Defendants/Appellants' Appendix (herein cited as Apx) pp. 12a-17a; and *Sorkowitz v. Lakritz Wissbrun* Supreme Court Order 7-11-05, Apx p. 62a. There is some level of confusion between the parties over who are the "named beneficiaries." As noted above, plaintiffs identified the named beneficiaries in their First Amended Complaint as Betty Sorkowitz, Betmar Charitable Foundation, Julie Shiffman and Janet Jacobs. As noted also in this footnote, other named beneficiaries have been dismissed by a stipulation reflected in an Order of this Court. Since defendants' Motion for Summary Disposition was an MCR 2.116(C)(8) motion, plaintiffs' First Amended Complaint listing of named beneficiaries would seem to settle the matter for purposes of the case at this stage. Defendants/Appellants seemed to agree. Brief on Appeal, pp. 1-2.
However in their objections to plaintiffs' quotation of language from a letter that both sides agree is not part of the record, "none of the persons referred to in the letter ... are beneficiaries under the irrevocable trust." Defendants/Appellants' Brief on Appeal, p. 6. This case has never involved beneficiaries under the irrevocable trust but rather beneficiaries under the Sarah Friedman Trust. Plaintiffs are uncertain as to the reasons for defendants' *non-sequitur* on this issue.

B. Third Amendment to Sarah Friedman Revocable Living Trust, dated July 20, 1988, amending and restating the Revocable Living Trust, dated August 1, 1979, as amended July 7, 1980 and July 17, 1982 ("Living Trust").

C. Fourth Amendment to the Revocable Living Trust, dated September 28, 1995.

D. Fifth Amendment to the Revocable Living Trust, dated January 6, 2000.

E. Sixth Amendment to the Revocable Living Trust, dated January 18, 2000.

F. Morris and Sarah Friedman Irrevocable Living Trust, dated July 20, 1988 ("Irrevocable Trust").[2]

Plaintiffs filed this suit on December 27, 2001 in the Oakland County Circuit Court.[3] The case was assigned to Judge Colleen O'Brien.

The reason a 1988 estate plan was the subject of a 2001 lawsuit can be determined by examining the First Amended Complaint, paragraphs 12 and 14. On July 2, 2001, plaintiffs received word of substantial tax penalties via a letter from the IRS.[4] The IRS letter was not an exhibit below other than being cited in the First Amended Complaint and in the Affidavit of plaintiffs' expert, Donald Lansky.

The First Amended Complaint asserts three areas of claims:

1. Gift tax liabilities due to defendants' leaving out of the estate plan a "Crummey Trust clause."[5]

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[2] Affidavit of Donald M. Lansky, Defendants/Appellants' Apx pp. 31a-33a. These documents comprising the estate plan were not admitted by either party in the case below except for a few pages which are noted at pp. 22a-28a of Apx. The documents comprising the estate plan were listed in the Affidavit of Plaintiffs' expert.

[3] Oakland Circuit Court Docket Entries, Apx pp. 1a-7a.

[4] First Amended Complaint, *Supra* at p. 16a and Affidavit of Donald M. Lansky, Apx, p. 31a.

[5] A "Crummey power" or "Crummey Trust clause" is an estate planning tool. It is named after a plaintiff who prevailed in litigation with the IRS. *Crummey v. Commissioner of Internal Revenue*, 397 F2d 82 (CA9, 1968). Much of appellants' "Statement of Facts" is argument about Crummey (pp. 2-4), and arguments about "boilerplate," "duplicitous," "hindsight-directed prescient vision," and "cramped view." Perhaps naively, plaintiffs have decided to submit the Counter-Statement of Facts pursuant to MCR 7.306(A) and MCR 7.212 (C)(6) and do so without "argument or bias." Consequently, the discussion of Crummey issues will be placed in the

2. "Generation-skipping" tax exemption errors due to lack of a Crummey provision.

3. Federal Estate of Michigan Inheritance Tax liabilities due to lack of a Crummey provision.[6]

Defendants filed an early motion for Summary Disposition, prior to filing an Answer and after some very limited discovery. This was an MCR 2.116(C)(8) Motion, meaning it was based on the pleadings and was not an analysis of the facts.[7] On May 7, 2002, defendants' Motion was granted.[8] Plaintiffs moved for rehearing on May 20, 2002, which was denied on May 24, 2002.

Plaintiffs filed a Claim of Appeal on June 12, 2002. On April 27, 2004, the Court of Appeals ruled in plaintiffs' favor. The case is published as *Sorkowitz v. Lakritz, Wissburn,* 261 Mich App 642; 683 NW2d 210 (2004).[9]

A timely Application for Leave was filed before this Court and Granted. The parties stipulated to dismiss as plaintiffs those persons who have been referred to as the "great grandchildren": Carolyn Jacobs, Renee Jacobs, Jodie Shiffman and Jeffrey Shiffman.[10]

Argument portion of this Brief. In simplest terms, Crummey is an estate planning tool that operates to let gifts made to a trust be done so without using up the donor's lifetime gift tax exclusion. It does so by a fiction that the beneficiary has a right to withdraw the gift when made. The "fiction" is that the window of time is open only shortly, 30 days is typical, and once closed, the right lapses. But because there is a theoretical right to withdraw, the rule is that the gift does not use up the lifetime exemption. Virtually all literature on Crummey notes that the plans are set up with the understanding among everyone involved, although the understanding won't be expressed, that the withdrawal won't be used and if it is, future gifts may not take place. There is a reported case where liability was found specifically for the failure to use a Crummey provision. This will be discussed in the Argument.

[6] First Amended Complaint, *Supra* at p. 16a.

[7] Opinion and Order Re Defendants' Motion for Summary Disposition, Apx p. 44a.

[8] Opinion and Order Re Defendants' Motion for Summary Disposition, Apx pp. 44a-47a.

[9] *Sorkowitz v. Lakritz Wissbrun,* Michigan Court of Appeals Decision 4-27-04, Apx pp. 54a-60a.

[10] *Sorkowitz v. Lakritz Wissbrun,* Supreme Court Order 7-11-05, Apx p. 62a.

STATEMENT OF STANDARD OF REVIEW

This appeal raises only matters of law that were addressed in the trial court in the context of summary disposition. This Court's review is *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999) and *Smith v Globe Life,* 460 Mich 446, 455; 597 NW2d 28 (1999). *De novo* review in summary disposition appeals arising out of suits against lawyers by the beneficiaries of a trust is specifically accepted as the proper appellate standard of review in *Bullis v Downes*, 240 Mich App 462, 467; 612 NW2d 435 (2000) and in *Karam v Kliber*, 253 Mich App 410, 419; 655 NW2d 614 (2002).

ARGUMENT I

Plaintiffs' legal malpractice claims are not "defective" as a matter of law" as violating the "extrinsic evidence" policy of *Mieras v. DeBona*, 452 Mich 278 (1996)

A. Michigan's appellate treatment of extrinsic evidence in estate planning-legal malpractice claims does and should distinguish between cases involving disputing claimants and those cases with issues of negligent lawyering: standing vs. negligence

1. Origins of extrinsic evidence rule in estate planning-legal malpractice claims:

The "extrinsic evidence" rule is a current expression of what was once called the "parol evidence" rule:

> Parol evidence cannot be resorted to to add to, vary or contradict the language of a written instrument unambiguous on its face, particularly a will.
>
> *Gardner v. City Nat.'l Bank & Trust Co.*, 267 Mich 270, 279; 255 NW 587 (1934)

While neither the term "parol evidence" or "extrinsic evidence" was used in the Opinion, the rule was applied in a legal malpractice estate planning case of *Ginther v. Zimmerman,* 195 Mich App 647, 655; 491 NW2d 282 (1992).

While testator had a various times indicated an intent to convey to Ginther a certain piece of property, in her **last last** will, she didn't do so. *Ginther*, Id. at 648-649. The Court of Appeals held that where claimants aren't named in a "testamentary instrument" within its "four corners," the attorney owes no duty to those claimants.

It must be kept in mind that the "no parol evidence" or "no extrinsic evidence" rule is incorporated into estate planning legal malpractice cases from the estate planning/probate field. *Gardner v. City Nat'l Bank & Trust Co., Supra.*

It is a sound rule for interpreting documents in an estate plan. It can create a conceptual gap when the claim is not that there is any error in the will *per se* but that the attorney negligently

drafted a will that may be valid on its face.

Indeed there is an argument that importing the "no extrinsic evidence" rule from will interpretation cases into legal malpractice cases may have mixed together two unrelated concepts:

> The rationale for such a rule appears to be that if a will is not ambiguous, the testator's intent must be found in the will itself, and extrinsic evidence is not admissible on the intent issue. Although the rule as stated is undoubtedly correct, the cases have misapplied it. The rule refers to the *interpretation* of wills. In a malpractice action, the plaintiff is not attacking the will, but alleging that the will was incorrectly drafted. Thus, the contract involved is not the will itself, *but the agreement to draft the will.* This latter contract is the basis of the malpractice action. Because the contract (between the attorney and the testator) is almost always oral, extrinsic evidence, including oral statements, is admissible to prove the terms of that contract.
>
> Martin D. Begleiter, *Attorney Malpractice in Estate Planning – You've Got To Know When to Hold Up, Know When To Fold Up,* 38 The University of Kansas Law Review 193, 201 (1990) (footnotes excluded)

In a case such as the present one, the will or the estate plan may be capable of being probated, having the correct number of signatures, the usual number of whereas', etc.:

> The challenge here is whether defendants are responsible for *negligently* drafting the wills. The provisions of the wills themselves, as effectuated, and the probate administration would remain unaffected.
>
> *Ogle v. Fuiten*, 112 Ill. App3d 1048; 445 NE2d 1344, 1348 (1983), *aff'd* 102 Ill2d 356, 466 NE2d 224 (1984) (emphasis in original)

2. FEUDING BENEFICIARIES: STANDING

Most cases applying the "four corners" rule in legal malpractice cases involve a refusal to vary from the terms of an estate plan in order to award to unnamed persons or to change a division of property among contesting named beneficiaries. *Ginther,* Id; see also, *Mieras v. DeBona,* 452 Mich 278, 281; 50 NW2d 202 (1996); *Bullis v. Downes*, 240 Mich App 462, 464-

465; 612 NW2d 435 (2000).

Certainly the above cases make clear that extrinsic evidence (outside the "four corners") will not be allowed to show that an estate plan that names A and B as beneficiaries should have also included C. Nor will extrinsic evidence be allowed to show that an estate plan that awards land to A should have assigned it to B.

As noted, *Mieras* was not a case where all the beneficiaries were harmed by negligent draftsmanship. It involved a dispute between heirs, one of whom was going to be disinherited. *Mieras v. DeBona, Supra* at 281.

Similarly in *Bullis v. Downes, Supra*, there was a dispute between what *Mieras* called disgruntled heirs. *Bullis v. Downes, Supra* at 464-465. *Mieras v. DeBona, Supra* at 301.

In the unreported case of *Panek v. Giarmarco*, 1997 Mich App LEXIS 2298, there were also feuding beneficiaries. Id. at p. 2. Addendum, Tab B.

3. DRAFTING ERRORS – NEGLIGENT LAWYERING

The rule is less clear and less compelling when it comes to the situation where **all** the beneficiaries are united in saying that everyone's interests have been diminished or harmed by bad draftsmanship. This is precisely the distinction noted by the Court of Appeals in the present case:

> The "four corners" rule is applicable in a dispute between potential beneficiaries concerning the intended distribution of the pot of assets or pie left by the decedent. It is not applicable to a claim such as this one, that seeks recovery for diminution in the pot or pie left by the decedents alleged to have been caused by the negligence of the defendants who provided estate planning. Here the interests of the deceased clients, the estate, and all the beneficiaries are aligned on the same side, and there is no danger that defendant attorneys will be wrongly held accountable to a third-party for properly implementing the desires of their client.
>
> *Sorkowitz v. Lakritz, Wissbrun, Supra* at 653

a. Estate Planning Attorneys Should Not Be Immunized From Malpractice Claims

1. The "dog that didn't bark"

The Court of Appeals in *Sorkowitz* noted that "There is no reason to exempt estate planning lawyers from liability for malpractice ..." *Supra* at 653.

As Sherlock Holmes noted in the famous story "The Adventure of Silver Blaze," sometime the absence of something expected tells the tale of what is going on. Nowhere is the issue of immunity discussed in either Appellant's Brief or the *Amicus* Brief. Yet this subtext is out there; it was on the minds of members of the *Amicus* organization. Note the language in commentary on *Sorkowitz* by the Honorable Phil Harter, Calhoun County Probate Judge and Chair of the Probate and Estate Planning Section (of the State Bar of Michigan):

> This 2-1 decision is a major dent in the apparent comprehensive shield of protection provided to estate planning attorney in drafting documents by the *Mieras* line of cases.
>
> Hon. Phil Harter,
> Website: Calhoun County Courts:
> http://courts.co.calhoun.mius/ca04.2704.htm

See also an article by a member of the law firm representing Defendants/Appellants discussing *Mieras* and *Bullis*:

> ... the **immediate practical implications** for estate planning attorneys are obvious. As long as the estate plan documents are internally consistent and effect the intent of the testator as it is expressed in the estate plan, the drafting attorney will have a strong defense to a subsequent malpractice action filed by the beneficiaries or the personal representative of the estate. **Of course**, every estate planning attorney intends to prepare internally consistent documents and to effect the intent of the testator.
>
> David C. Anderson: *The Last Man Standing: Viability of Malpractice Claims Against Estate Planning Attorneys Substantially Eroded*,
> 22 Michigan Probate & Estate Planning No. 3, Spring 2003, p.6 (emphasis added)

Reading the above, it wouldn't matter if the most costly and egregious errors were made as long as the documents were "internally consistent."

No segment of any profession should have unfair exposure to negligence claims. But no segment should be immunized from their own negligence unless by decision of the Legislature.

Attorneys who are faced with making or recommending an informed choice between two acceptable alternative methods, as in *Karam v. Kliber, Supra*, 412-413, should be protected by what has come to be known as "attorney judgment rule." *Simko v. Blake,* 448 Mich 648, 658; 532 NW2d 842 (1995).

The problem in the short-circuited record below in the present case is that it was terminated before an exploration of why the obvious and substantial tax savings of the Crummey clause were not used.

Before the trial court, defendants argued that while Crummey clauses have drawbacks, they were "relatively popular" and were "an estate planning tool that can, under certain circumstances, provide a way to reduce estate taxes." Defendants' Motion for Summary Disposition, p. 2. Defendants' Supreme Court Brief has a different theme, introducing concepts of a Cristofani Crummey clause never argued to either the trial court of the Court of Appeals.

In any event, there was limited exploration of the defendants' files to see if evidence exists as to whether an informed choice was made by the attorney or the client.

b. "Commonly Used" vs. Extraordinary

Justice Boyle in *Mieras* expressed that it would create endless possibilities to examine each paragraph of a will to see if it was "common to include or exclude" a provision. *Mieras v. DeBona, Supra* at 303.

As noted below, some of the decisions cited favorably by Justice Boyle do use extrinsic evidence to find an estate plan deficient:

1. An examination of the Rule Against Perpetuities. *Lucas v. Hamm,* 15 Cal Reptr. 821; 364 P2d 685 (1961);

2. An examination of a statute relating to execution of a will. *Guy v. Liederbach,* 459 A2d 744 (Pa, 1983)

As plaintiffs note below in the Crummey discussion (pp.15-18), Crummey provisions are not merely "common" or one of several acceptable alternatives, *Karam v. Kliber, Supra,* at 412-414, they are: **"ubiquitous"** and **"essential."**

4. USE OF EXTRINSIC EVIDENCE IN POST-*MIERAS* ESTATE PLANNING-LEGAL MALPRACTICE CASES

While there was no "extrinsic evidence" whose admission was at issue in *Bullis*, the Court of Appeals evaluated such evidence in its Opinion: the testimony of the defendant. Id. at 466 and 470.

The other post-*Mieras* appellate case is *Karam v. Kliber*, 253 Mich App 410 (2002). This is the one Michigan post-*Mieras* reported appellate Opinion (other than the present one) in which the beneficiaries were not feuding. In *Karam*, the Court of Appeals used, if not extrinsic evidence, extrinsic sources in its Opinion. Id. at 412, 413 and 415. The "extrinsic evidence" in dispute in *Karam* seems to have been a letter written by an officer of a defendant financial planner. *Karam v. Kliber,* Id. at 415.

Defendants engage in a discussion of law from other states regarding the use of extrinsic evidence.

a. Out-of-State cases cited in *Mieras v. DeBona*

In the lead Opinion in *Mieras v. DeBona*, Justice Boyle discussed cases from other states that "properly illustrate" the extrinsic evidence rule as used in this field. *Mieras v. DeBona, Supra,* at 303.

Lucas v. Hamm, 15 Cal Reptr 821; 364 P2d 685 (1961) does not discuss the issue of extrinsic evidence. Rather, the court determined that, for various other reasons, the plaintiffs

would not prevail. Apparently the estate plan violated the Rule Against Perpetuities. *Lucas v. Hamm, Supra* at 690. Of course, in order to determine that an estate plan violated this rule, a trial court would have to take Judicial Notice of the Rule and its parameters. Judicial Notice is evidence, MRE 202 and statutes, law review articles, case law and bar journals, such as were cited in *Lucas v. Hamm*, Id. at 690, are certainly extrinsic to an estate plan.

The next case discussed by Justice Boyle is *Guy v. Liederbach,* 459 A2d 744 (Pa, 1983). Once again, the concept of extrinsic evidence is never discussed. By looking at a since-repealed statute, the court was able to determine that a will was improperly executed and thus void. *Guy v. Liederbach*, Id. at 747. Once again, examining a statute to apply it to a case would be use of "extrinsic evidence," just not "extrinsic evidence" offered by the parties.

In *Espinosa v. Sparber*, 612 So2d 1378 (Fla, 1993), the next case discussed in *Mieras*, the case did involve extrinsic evidence. In *Espinosa,* a disgruntled heir, an after-born child, attempted to present evidence that she was named in a new but unsigned will. The last written document signed simply did not mention decedent's after-born child. Id. at 1379. This case goes to issues of the standing of disgruntled heirs rather than attorney negligence.

The last case discussed by Justice Boyle in the list of "proper limitations" is *DeMaris v. Asti*, 426 So2d 1153 (Fla, App 3 Dist 1983). *DeMaris* cites the rule on extrinsic evidence but doesn't identify the offending evidence. It does note that once again, the Court was dealing with a "disappointed beneficiary." Id. at 1154.

b. Other Out-Of-State Cases

As noted below, one state Supreme Court has already dealt with the failure to use a Crummey provision.[11] And as noted above, there is a distinction between a sound rule for interpreting wills and trusts and what rule to apply in determining errors, omissions and other

[11] See discussion below at p. 15 on *Hatleberg v. Norwest Bank Wisconsin*, 2005 W 109; 700 NW2d 15 (2005).

problems in drafting or not drafting the will or trust in the first place.

The same court that decided *Lucas v. Hamm* in 1961 had occasion years later to deal with the failure of the attorney to advise the client of a "well-known" tax savings device, i.e., the effect of a general power of appointment on a marital deduction trust. *Bucquet v. Livingston,* 129 Cal Reptr. 514, 519; 57 CalApp3d 914 (1976). And further:

> Further, numerous commentators have criticized the blanket rule excluding extrinsic evidence of the testator's intent as unduly harsh. As one commentator stated, "[I]t is difficult to imagine a harsher or more absurd result when the misstatement of the testator's intent results from the attorney's negligent advice or neglect." Mary Elizabeth Phelan, *Unleashing The Limits On Lawyers' Liability? Mieras v. Debona: Michigan Joins The Mainstream And Abrogates The Privity Requirement In Attorney-Malpractice Cases Involving Negligent Will Drafting,* 72 U.Det.Mercy L.Rev. 327 (1995). This inequity prompted one commentator to opine:
>
> > Beneficiaries should not be barred from recovery, when the misstatement of the testator's intent results from the attorney's negligent advice. The complexity of estate planning forces testators to rely on the services of attorneys. Testators presumably bargain for competent estate planning services. When they receive less than bargained for, the law should permit beneficiaries to recover for damages resulting from the attorney's negligence. The limitation requiring that intent be "stated in the testamentary instrument" can lead to arbitrary results when there are inadvertent errors in the will.
>
> Matthew R. Bogart, *Legal Malpractice For the Negligent Drafting Of A Testamentary Instrument: Schreiner v. Scovill,* 73 Iowa L.Rev. 1231. 1246 (1988).
>
> *Creighton University v. Kleinfeld,* 919 F.Supp. 1421, 1427 (E.D.Cal. 1995)

It should be obvious that if an attorney errs in setting up an estate plan because he or she lacks knowledge or competence, the estate plan may be readable and "probateable" but deeply and expensively flawed.

The Court of Appeals was exactly right. Clients go to estate planning attorneys to be guided through the tax savings maze. *Supra* at 651. If the attorney has no role in explaining tax

savings and planning, if the most egregious errors can be indulged as long as the flawed estate plan is "internally consistent," even the wealthiest clients might as well do their estate plan from a formbook.

All courts use some level of extrinsic evidence in estate planning malpractice cases. Perhaps it is an admission of the defendant, or reference to statutes or tax codes.[12] One approach was to allow extrinsic evidence but by a standard of "clear and convincing evidence." *Erickson v. Erickson,* 716 A2d 92 (Conn, 1998). In *Erickson*, the Court allowed extrinsic evidence in the form of testimony, including that of the drafting attorney who honestly admitted to a "scrivener's error." Id. at 94.

What happened in *Erickson* was this. The testator gave a portion of his estate to his beloved daughter. He almost immediately got remarried. Under the peculiarities of Connecticut law, his remarriage completely disinherited his daughter before the ink was dry on the estate plan. The estate plan was "internally consistent" but obviously unjust and completely at odds with the testator's intent. Had the attorney put an after-marriage clause in the plan, the result would have been avoided. The Court allowed the extrinsic testimony.

While *Mieras* did not deal with omitting an "essential" tax tool, there is a Wisconsin case that specifically deals with the failure to use a Crummey provision. *Hatleberg v. Norwest Bank Wisconsin*, 2005 W 109; 700 NW2d 15 (2005) (see further discussion below under "Crummey").

B. DISCOVERY

The Court of Appeals in *Sorkowitz* noted the need for discovery to determine the facts. *Supra* at 652. It would stand to reason that discovery would lead to one of several results:

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[12] The Court in *Karam* recognized the *Mieras* Opinion could be read to exclude references to tax tables: "Thus, it would seem to be impossible for a beneficiary to have standing under *Mieras* in situations where complicated estate planning documents are involved because this beneficiary would never be able to show, without reference to at least some extrinsic evidence, that the attorney frustrated the decedent's intent through poor drafting." *Karam v. Kliber, Supra* 426-427 at fn. 10.

1. Evidence that defendants intended to utilize a Crummey clause for their clients and neglected to do so or erroneously thought the language was present;

2. Evidence that the attorneys presented the option to the clients and the clients declined it;

3. No evidence at all. In that case, plaintiffs would have a very heavy burden of proving that the absence of such a tax-savings clause was virtually universal.

Regarding that latter point. There are some legal tools or options whose use is so basic that not to use them would require a special showing as to why.

Even though it can be assumed that defendants will be well prepared for any deposition, much of the history of the estate plan is 'cemented in paper,' as Yogi Berra might express it. Plaintiffs need only to find one subsequent document that demonstrates that defendants thought or assumed a "Crummey clause" had been utilized in the estate plan. That would remove the issue from the issues of "standard of practice" and "unusual and extraordinary" and place it in the category of metaphysical certainty.

While plaintiffs will refrain from discussing the subsequent letter from defendants to which defendants object (Defendants' Brief, pp. 5-6), it's not at all unusual to gain admissions via the route of discovery from a party opponent.

There is long settled Michigan law that admissions in civil cases may not only be derived from the pending matter (*Karam v. Kliber*) but also prior testimony *Becker-Witt v. Board of Examiners of Social Workers*, 256 Mich App 359; 663 NW2d 514 (2003), *app den* 469 Mich 876; 668 NW2d 146, signed forms, *Moore v. DuBard*, 318 Mich 574; 29 NW2d 94 (1947), or verbal comments, *Marner v. Thorpe*, 284 Mich 331; 279 NW2d 849 (1938).

Of course, it is possible also that discovery might disclose that the attorney creating the estate plan was unaware of the Crummey decision, an obvious explanation for its not being included.

C. CRUMMEY

In terms of what the record in the trial court was, the only evidence as to what Crummey means or is was the brief reference in plaintiffs' expert's Affidavit. That was in paragraph 11 of his Affidavit. There was some limited discussion in Briefs about Crummey but no other **evidence**. The most cogent discussion to date regarding Crummey was the Opinion of the Court of Appeals.

One of the observations of the Court of Appeals was that Crummey provisions have now become "standard" in irrevocable trusts. *Sorkowitz v. Lakritz Wissbrun, Supra* at 646.

Because this was an MCR 2.116(C)(8) Motion, it was decided by the trial court without an analysis of the status of the use of Crummey provisions. The word "Crummey" is used once in the trial court's Opinion and then only to note the nature of plaintiffs' claim.

An interesting case in 2004 discussed **liability for the failure to use Crummey in a trust:**

> Duplessie drafted the trust document, apparently modeling it after one in a form book in his office. While the trust was intended to be one way for Erickson to reduce her estate tax burden, it needed to provide the recipients with a present interest in Erickson's gift for the money to qualify for the tax exemption. See 26 U.S.C. Section 2503(b)(1)(2002). This is normally accomplished through *Crummey* provisions included in the trust, although Erickson's trust contained no such language.
>
> *Hatleberg v. Norwest Bank Wisconsin,*
> N/K/A Wells Fargo Bank, 271 Wis2d 225;
> 678 NW2d 302, 305 (2004)

This case was affirmed by the Wisconsin Supreme Court in 2005. *Hatleberg v. Norwest Bank Wisconsin,* 2005 W 109; 700 NW2d 15 (2005).

A distinction between the present case and *Hatleberg* is that the present case was terminated before defendants could be compelled to discuss the lack of a Crummey clause and to see what parts of their file would add up to an admission that either Crummey was never considered or that it was intended to be used but that, a la *Hatleberg*, the wrong part of

defendants' computer program or form book was used. It is noted in both *Hatleberg* Opinions that the parties agreed the trust was defective for not containing a Crummey provision. See *Hatleberg v. Norwest Bank Wisconsin,* 2005 W 109; 700 NW2d 15 (2005), p. 7. Lest it be thought that Wisconsin attorneys are more forthcoming than those in Michigan, it should be kept in mind that often the admissions of parties come after the detailed "paper chase" that is discovery leaves no other alternative.

Defendants/Appellants selectively quote from commentators trying to argue that consideration of Crummey is not standard or "normal" (to use the *Hatleberg* language quoted above). One commentator cited by Defendants/Appellants is Professor Bradley E.S. Fogel of St. Louis University School of Law. However, Defendants/Appellants only cite Fogel for a general proposition re-arguing the privity issue abandoned by this Court in certain areas years ago.[13]

But Defendants/Appellants could have cited Fogel on Crummey:

> **Crummey Powers**
>
> In order to obtain the annual exclusion for gifts made to the trust, the beneficiaries of the trust are given rights-*Crummey* powers-to withdraw an aliquot share of the gift to the trust. This immediate, albeit temporary, right to withdraw the gift made to the trust makes the transfer a present interest, which qualifies for the federal gift tax annual exclusion. *Crummey v. Commissioner*, 397 F2d 82 (9th Cir. 1968). This is true even though the withdrawal power lapses.
>
> A typical *Crummey* withdrawal power lapses 30 days after the gift is made to the trust. Although never explicitly ruled on, this seems the shortest period of time that will pass muster with the IRS. Rev. Rul. 81-7; PLR 9232013; PLR 9030005; PLR 8922062; PLR 8022048. For example, in TAM 9131008 the IRS ruled that a 20-day period too severely restricted the beneficiary's possible exercise of the power. Courts have allowed annual exclusions based on *Crummey* powers that have lapsed after less than 30 days. *Crummey*, 397 F2d at 83 (power lapsed after twelve days); *Cristofani v. Commissioner*, 97 T.C. 74 (1991) (power lapsed after 15 days). These cases do not, however, specifically address the

[13] Regarding privity, *Noble v. Bruce*, 709 A2d 1264 (Md, 1998), cited by defendants, has been cited by one commentator as one of a small group of states hanging on to the privity doctrine. Martin D. Begleiter, *First Let's Sue All the Lawyers – What Will We Get: Damages for Estate Planning Malpractice,* 51 Hastings Law Journal 325, 327 (2000).

> time period. Further, a few older private rulings seem to allow the exclusion even though the power lapsed in less than 30 Days. PLR 8111123 (10 days); PLR 7922107 (3 days.)
>
> Bradley E.S. Fogel, "*Life Insurance and Life Insurance Trusts: Basics and Beyond,*" Probate & Property, January/February 2002

Or Defendants/Appellants could have cited Fogel from another article:

> Every once in awhile, you have to feel sorry for the Internal Revenue Service (IRS or Service). Sometimes the law seems to be getting away from the IRS, and, despite its best efforts, the IRS is powerless to prevent taxpayers from exploiting what it obviously feels is a loophole in the tax law. The use of *Crummey* withdrawal powers to obtain federal gift tax annual exclusions, and thus avoid the federal gift tax, is an example of such a situation.
>
> ***
>
> *Crummey* powers are a **ubiquitous** and powerful estate planning tool. Despite the current **broad use** of *Crummey* powers, however, the IRS has, to a large extent, been coerced into a reluctant acceptance of *Crummey* powers.
>
> (footnotes omitted)
>
> ***
>
> Moreover, *Crummey* powers are **essential** to the transfer tax advantages provided by life insurance trusts. Life insurance trusts are an enormously powerful estate planning device.
>
> ***
>
> Without *Crummey* powers, gifts to the life insurance trust would be taxable gifts, which would greatly reduce the transfer tax savings.
>
> ***
>
> It is clear that the use of the annual exclusion is a **tremendously powerful estate planning tool.**
>
> Bradley E.S. Fogel, *"The Emperor Does Not Need Clothes – The Expanding Uses of 'Naked' Crummey Withdrawal Powers to Obtain the Federal Gift Tax Annual Exclusion,"* 73 TUL.L.Rev. 555, 556, 558, 562, 563, 617 (1998) (emphasis added)

And Fogel puts to rest Defendants/Appellants' attempt to argue (which it never did in the trial court or Court of Appeals) that there is some meaningful difference between Crummey and a form of Crummey known as Cristofani. Id. at 584-587.

Virtually every commentator discussing Crummey puts to rest Defendants/Appellants' specter that a "withdrawal **right**" is adverse to the Friedman's desire that persons under 18 not receive a **distribution**. Aside from the obvious fact that a "withdrawal right" that quickly lapses forever is different than a distribution, all grantors have a similar concern and the commentators all cite how this is easily dealt with. Let's start again where Defendants/Appellants left off, with Professor Fogel:

> If the *Crummey* withdrawal power provisions of the trust agreement are not acceptable to the donor, it is possible to vary the terms of the withdrawal right in the instrument by which the donor makes the gift to the trustee. It may be wise to anticipate this possibility in the trust agreement. Such a variance might, for example, be appropriate if the withdrawal power provisions of the agreement fail to account for inflation adjustments in the annual exclusion or to exclude a beneficiary who has demonstrated a propensity to exercise the withdrawal power.
>
> ***
>
> *Crummey* powers are rarely exercised. Thus, the difficulty in satisfying an exercised *Crummey* power may be more theoretical than practical.
>
> Bradley E.S. Fogel, "*Life Insurance and Life Insurance Trusts: Basics and Beyond,*" Probate & Property, January/February 2002, p. 11

ARGUMENT II

The remaining plaintiffs are proper parties under current Michigan case law for estate planning legal malpractice claims.

Plaintiffs filed suit shortly before the statute of limitations would run. MCLA 600.5838(2). As regards the "great grandchildren" of Morris and Sarah Friedman: Carolyn Jacobs, Renee Jacobs, Jodie Shiffman and Jeffrey Shiffman, whether they were proper parties or not, they were stipulated out of the case as is reflected in Defendants/Appellants' Appendix, p. 62a.

The trial Court initially agreed with defendants that "Plaintiffs lack standing." Defendants/Appellants' Appendix, p. 45a. Later the trial Court held that the Estate of Sarah Friedman and the Sarah Friedman Trust were not proper parties. The findings as to the Estate and the Sarah Friedman Trust were that they sustained no loss. Defendants/Appellants' Appendix, p. 46a.

The Estate of Sarah Friedman (also referred to as the Living Trust) is the post-death alter-ego of Sarah Friedman, a client of defendants. MCL 600.2921; *In re Olney's Estate*, 309 Mich 65; 14 NW2d 574 (1944); and *Hardy v. Maxheimer,* 429 Mich 422; 416 NW2d 299 (1987). Obviously, as a client of defendants, the whole *Mieras* quandary is avoided.

It is the duty of the estate to collect the assets of the deceased. *Mieras v. DeBona*, 452 Mich, *Supra* 290. There seems to be a split between the statutory policy that heirs bring tort claims through the estate and certain language in *Mieras* that suggests letting the various beneficiaries sue rather than the estate. Plaintiffs suggest that the Court of Appeals was correct in holding that this issue should be reserved pending discovery. It would have been better if the trial judge had bothered to request and review the estate plan documents before assuming or presuming standing.

The Michigan Supreme Court in *Mieras* and the trial court in this case are correct in that, ultimately, an estate ends and its assets pass on to someone or something. However, to stop the analysis there ignores several realities. Plaintiff contends that these realities cannot be sorted out in a pre-discovery Summary Disposition Motion. Plaintiff contends that these realities constitute an exception to the Michigan Supreme Court's assumption that an estate lacks "the incentive" to assert a claim, *Mieras v. DeBona*, Id at 297. The realities are:

1. An estate may be open for years before beneficiaries are finally determined. The statute of limitations may have run in the meantime;

2 As indicated by Donald Lansky, the tax authorities are pursuing taxes, penalties and interest from the estate. While this may someday mean reduced shares for the heirs, it is the estate who will cut the check.

As to the Sarah Friedman Trust, trusts may maintain causes of action. MCR 2.201(B)(1). The record is silent as to the terms of the Trust other than plaintiffs' assertion in their First Amended Complaint as to who the beneficiaries of the Trust were. Defendants/Appellants' Appendix, p. 13a and Plaintiffs' Brief in the trial Court, Defendants/Appellants' Appendix, p. 21a.

As to the Morris and Sarah Friedman Irrevocable Trust, Defendants/Appellants are correct that while this Trust is the plan whose defect caused the problem, it is not a proper party. Plaintiffs anticipate that it may be stipulated out by the time of argument. An examination of the Court of Appeals Opinion doesn't seem to reference this entity. The Court of Appeals Opinion refers to the "Living Trust" (note the singular form of the word "Trust') at page 654.

RELIEF REQUESTED

That the decision of the Court of Appeals be affirmed and this matter be remanded to the trial court with instruction to permit the parties to engage in discovery as permitted by the Michigan Court Rules.

Respectfully submitted,

BY: _____

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Dated: August 23, 2005

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